No. 02-215

Supreme Court, U.S.
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In The Supreme Court of the United States

IN RE HUMANA INC. MANAGED CARE LITIGATION

PACIFICARE HEALTH SYSTEMS, INC., et al.,

Petitioners,

v.

JEFFREY BOOK, D.O., et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether federal courts or arbitrators should decide if arbitration agreements that preclude pursuit of federal statutory rights are enforceable under the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*?

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Federal Arbitration Act

9 U.S.C. § 1, *et seq.* i

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Racketeer Influenced and Corrupt Organizations Act

18 U.S.C. § 1961, *et seq.* 1

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STATEMENT OF THE CASE

Respondents are physicians from California, Colorado, Florida, Kentucky and Texas who have been victimized by automated claims processing schemes developed and deployed by Petitioners and other managed care companies to deprive them of payment for rendering covered, medically necessary services to their insureds.

This case began when cases filed by Respondents throughout the country were transferred to the Southern District of Florida by the Federal Judicial Panel on Multi-District Litigation. On August 14, 2000, in response to the district court's scheduling order, Respondents joined in the filing of an amended complaint on behalf of themselves and others similarly situated against Petitioners and other companies seeking relief, *inter alia*, under Section 1964(c) of the Racketeer Influenced and Correct Organizations Act ("RICO"), 18 U.S.C. § 1961, *et seq.*, for violations of 18 U.S.C. § 1962(a) and (c) thereof, for conspiracy to violate 18 U.S.C. § 1962(a) and (c) in violation of 18 U.S.C. § 1962(d), for aiding and abetting violations of 18 U.S.C. § 1962(a) and (c) in violation of 18 U.S.C. § 2, and for breach of contract, quantum meruit and unjust enrichment.

Most of the managed care company defendants, including Petitioners, filed motions to compel arbitration pursuant to 9 U.S.C. § 4 of the Federal Arbitration Act based upon arbitration clauses contained in various contracts with Respondents. On December 11, 2000, the district court entered its Order Granting in Part and Denying in Part Various Defendants' Motion to Compel Arbitration, 132 F. Supp. 2d 989, Petitioners' App. 11, making the following rulings on the pending arbitration

issues: that claims for breach of contract, quantum meruit and unjust enrichment arising out of the treatment of patients pursuant to contracts with arbitration clauses were arbitrable (Petitioners' App. 29-44); that Respondents' RICO conspiracy and aiding and abetting claims against defendants with whom they had no arbitration agreements, or which stemmed from contractual relationships with other managed care companies, were not arbitrable (Petitioners' App., 16-20, 29-44); that, with the exception of the claims against Petitioners, Respondents' direct RICO claims for violations of 18 U.S.C. § 1962(a) and (c) were arbitrable (Petitioners' App. 22-24, 29-44); and that, with respect to direct RICO claims asserted against Petitioners, provisions in their arbitration agreements limiting the power of the arbitrators to award punitive damages, and in the case of some of the United Petitioners' contracts, extra-contractual damages as well, prevented Respondents from obtaining meaningful statutory relief in arbitration and rendered those arbitration clauses unenforceable. (Petitioners' App. 22-24, 29-31, 40-41).

It is the last ruling, along with an identical ruling made by the district court in an April 26, 2001 order on a subsequent motion to compel arbitration filed by the PacifiCare Petitioners, 143 F. Supp. 2d 1371, 1374; Petitioners' App. 47, 51, that forms the basis of the Petition for Writ of Certiorari. Petitioners did not, however, argue in the district court that arbitrators rather than the court should make this decision.

Petitioners appealed both of the district court's arbitration orders to the Eleventh Circuit Court of Appeals, which consolidated the two appeals, nos. 01-10247 and 01-12596, for argument and decision. As was the case in the

district court, Petitioners did not argue in appeal no. 01-10247 that arbitrators rather than courts should decide whether their arbitration clauses precluded pursuit of federal statutory remedies so as to render them unenforceable under the Federal Arbitration Act. In appeal no. 01-12596, the PacifiCare Petitioners raised the issue for the first time in their reply brief.

The Court of Appeals affirmed the district court, confining its opinion to broader and more hotly contested issues. Of relevance to the question Petitioners now present, the Court of Appeals stated only:

> The district court made four rulings related to this appeal. . . . Second, relying primarily on our opinion in *Paladino v. Avnet Computer Technologies, Inc.*, 134 F. 3d 1054 (11th Cir. 1998), the court found that those arbitration clauses that exclude punitive damages are unenforceable in this suit because they preclude recovery of treble damages under RICO; therefore, an HMO may not compel arbitration of a RICO suit under such an arbitration clause.
>
> * * *
>
> We affirm in its entirety the district court's order for the reasons set forth in its comprehensive opinion found at 132 F. Supp. 989 (S.D. Fla. 2002).

285 F. 3d at 973-944; Petitioners' App. 3-4.

REASONS FOR DENYING THE PETITION

A. The Question Petitioners Present For Review Was Neither Raised Nor Resolved Below

In reasons A and B for granting the petition, Petitioners identify two levels of conflict they perceive among the Circuit Courts of Appeals on the issue of whether the district court or the arbitrator should decide whether a plaintiff can be compelled to arbitrate federal statutory claims under an arbitration clause that does not permit vindication of the rights afforded by the statute. In reason D, Petitioners identify several policy reasons they believe militate for review of the same question, and add a sub-question – whether the district court or the arbitrator should decide exactly what effect the arbitration clause has on the pursuit of federal statutory rights. And in reason E, Petitioners suggest that the petition should be granted because the Court is poised to resolve what they dub a parallel "who should decide" question in the context of the National Association of Securities Dealers ("NASD") Code of Arbitration Procedure.

However, the who should decide question at the heart of each of these reasons for granting the petition was never properly before the courts below, and was neither addressed nor resolved by them. Despite the fact that the conflict envisioned by Petitioners in reason B dates back to at least 1997, and that the conflict the Court has decided to resolve in *Howsam v. Dean Witter Reynolds, Inc.*, No. 01-800, goes back even further, Petitioners never argued in the district court that an arbitrator, as opposed to the court, should decide whether plaintiffs could be compelled to arbitrate their RICO claims. To the contrary, Petitioners urged the district court to decide the question on its merits, and the district court did, never considering the

procedural question Petitioners now present. (Petitioners' App. 22-24, 29-32, 40-41).

In the Circuit Court of Appeals, in case no. 01-10247, Petitioners again failed to raise the issue, arguing instead that the district court's decision not to compel arbitration of plaintiffs' RICO claims was wrong on the merits. In subsequent appeal no. 01-12596, which was consolidated for argument and decision, Petitioners also failed to raise the question they now present in their initial briefs. It was raised for the first time, and then only by the PacifiCare Petitioners, in their reply brief. But issues raised for the first time in a reply brief are not properly before the Court of Appeals, *e.g., Fogade v. ENB Revocable Trust*, 263 F. 3d 1274, 1296 n.19 (11th Cir. 2001); *Hartsfield v. Lemacks*, 50 F. 3d 950, 953 (11th Cir. 1995), and the who should decide question they now present was neither addressed nor resolved in the Eleventh Circuit's decision. (Petitioners' App. 1-10).

Thus, whatever merit Petitioners' reasons for granting the writ may have, which, as set forth below, is precious little, this case is not an appropriate vehicle for review of the question presented. *E.g., Youakim v. Miller*, 425 U.S. 231, 234 (1976) ("Ordinarily, this Court does not decide questions not raised or resolved in the lower court"); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them.").

B. The Court Has Already Decided The Question Presented

Although Petitioners cast a wider net in search of conflict, this Court has already decided the only question that, if raised, could have been presented by the decision below, i.e., whether, when considering a motion to compel arbitration of a federal statutory claim pursuant to 9 U.S.C. § 4 of the Federal Arbitration Act, courts should determine if the arbitration clause at issue prevents the plaintiff from pursuing his or her statutory rights and remedies so as to render the clause void or unenforceable.

The Court first considered the arbitrability of federal statutory claims in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), where the claim at issue was one for treble damages based on anti-trust violations. Based on the premise that, "[b]y agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute," the Court held that federal statutory claims could, as a general proposition, be arbitrated. The Court went on to caution, however, that this would not always be the case, and that courts had to determine whether the statute at issue evinced an intention on the part of Congress to override the policy manifested in the Federal Arbitration Act so as to ren ler an agreement to arbitrate claims thereunder unenforceable:

> That is not to say that all controversies implicating statutory rights are suitable for arbitration. . . . Just as it is the congressional policy manifested in the Federal Arbitration Act that requires courts liberally to construe the scope of arbitration agreements covered by the Act, it is congressional intention expressed in some other

> statute on which *courts* must rely to identify any category of claims as to which agreements to arbitrate will be held unenforceable. . . . Having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.

Id. at 627-628. (citations omitted) (emphasis added).

Speaking even more directly to the question presented, the Court decided the enforceability question itself rather than refer it to arbitrators, and sanctioned the two-step inquiry used by the Court of Appeals to make the same decision:

> In sum, the Court of Appeals correctly conducted a two-step inquiry, first determining whether the parties' agreement to arbitrate reached the statutory issues, and then, upon finding it did, considering whether legal constraints external to the parties' agreement foreclosed the arbitration of those claims.

Id. at 627-628. (citations omitted).

This, of course, is the same analysis that was conducted below. Having decided that the parties' arbitration clauses were broad enough to reach certain of Respondents' RICO claims against Petitioners, the determination was then made that "legal constraints external to the parties' agreement," i.e., congressional policy as reflected in RICO, rendered the arbitration clauses unenforceable because they precluded vindication of plaintiffs' statutory rights under RICO. (Petitioners' App. 22-24, 29-31, 40-41).

The Court continued to flesh out the role courts are to play in making this decision in subsequent cases. For

example, in *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987), the Court explained how *courts* should determine whether congressional intent overrides an arbitration agreement in a particular context:

> The Arbitration Act, standing alone, therefore mandates enforcement of agreements to arbitrate statutory claims. Like any statutory directive, the Arbitration Act's mandate may be overridden by a contrary congressional command. The burden is on the party opposing arbitration, however, to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue. If Congress did intend to limit or prohibit waiver of a judicial forum for a particular claim, such an intent 'will be deducible from [the statute's] text or legislative history,' or from an inherent conflict between arbitration and the statute's underlying purposes.

Id. at 226-227. (citations omitted).

And in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), and *Green Tree Financial Corp. – Alabama v. Randolph*, 531 U.S. 79 (2000), contrary to Petitioners' admonition in reasons D(2) and (3) for granting the petition that this is a job for arbitrators rather than courts, the Court analyzed the barriers to relief contained in the arbitration clauses at issue to determine whether they sufficiently thwarted pursuit of federal statutory remedies to warrant a determination under the third prong of the test announced in *McMahon* that arbitration would frustrate Congress' intent in enacting the statute. As the Court stated in *Green Tree* in confirming both the procedure followed below and the need to analyze such barriers:

> In determining whether statutory claims may be arbitrated, we first ask whether the parties agreed to submit their claims to arbitration, and then whether Congress has evinced an intention to preclude waiver of judicial remedies for the statutory rights at issue.
>
> * * *
>
> It may well be that the existence of large arbitration costs could preclude a litigant such as Randolph from effectively vindicating his federal statutory rights in the arbitral forum.

531 U.S. at 90.[1]

In short, the who should decide question embedded in the decision below – whether the court or an arbitrator should determine if congressional intent to override the

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[1] Petitioners' suggestion in reason D(1) for granting the petition that congressional intent to preclude waiver of federal statutory rights can only be gleaned from express statutory language either ignores, or asks the Court to abandon, the third prong of the test for congressional intent enunciated in *McMahon* and applied in *Gilmer* and *Green Tree*, i.e.. that congressional intent to limit or prohibit waiver can be discerned, *inter alia* from "an inherent conflict between arbitration and the statute's underlying purposes." *McMahon*, 482 U.S. at 227. The only decisions Petitioners cite for this proposition, *United States v. Mezzanatto*, 513 U.S. 196 (1995), and *Metro East Center for Conditioning and Health v. Qwest Communications Int'l, Inc.*, 294 F. 3d 924 (7th Cir 2002), involve neither the waiver of federal statutory rights nor the issue of how congressional intent to preclude such waiver is to be determined. Both merely recited the general proposition that federal statutory rights are waivable absent congressional intent to the contrary on the way to deciding questions concerning the waiver of other kinds of rights. *Mezzanatto*, 513 U.S. at 201 (waiver of exclusionary rules for statements made in plea discussions); *Metro East*, 294 F. 3d at 928-930 (waiver of applicable attorney's fee rule in favor of American Rule).

Federal Arbitration Act renders an arbitration clause unenforceable in the context of a federal statutory claim – has already, and repeatedly, been decided by the Court.

C. The Conflict Petitioners Perceive Concerning The Question Presented Does Not Exist

In reasons B for granting the writ, Petitioners argue that there is a deep and general conflict among the Circuit Courts of Appeals concerning whether district courts or arbitrators should decide if an arbitration agreement that precludes pursuit of federal statutory rights is enforceable, and in reason A that the Eighth Circuit's decision in *Larry's United Super, Inc. v. Werries*, 253 F. 3d 1083 (8th Cir. 2001), which holds that an arbitrator should decide whether an arbitration clause that precludes recovery of punitive damages is enforceable in the context of RICO claims, is one component of this conflict.

Reality, however, is otherwise. With the exception of the Eighth Circuit's decision in *Werries*, all of the seven Circuit Courts of Appeals that have considered motions to compel arbitration of federal statutory claims have followed the Court's teachings in *Mitsubishi, McMahon, Gilmer* and *Green Tree* by deciding the enforceability question themselves. *See Investment Partners, L.P. v. Glamour Shots Licensing, Inc.*, 298 F. 3d 314 (5th Cir. 2002); *McCaskill v. SCI Management Corp.*, 298 F. 3d 677 (7th Cir. 2002); *Johnson v. West Suburban Bank*, 225 F. 3d 366 (3d Cir. 2000); *Paladino v. Avnet Computer Technologies, Inc.*, 134 F. 3d 1054 (11th Cir. 1998); *Cole v. Burns Int'l Security Services*, 105 F. 3d 1465 (D.C. Cir. 1997); *Graham Oil Co. v. ARCO Products Co.*, 43 F. 3d 1244 (9th Cir. 1995).

That leaves only *Werries*, where the Eighth Circuit held:

> At this juncture, our jurisdiction extends only to determine whether a valid agreement to arbitrate exists, not to determine whether public policy conflicts with the remedies provided in the arbitration clause.

235 F. 3d at 1086. To the contrary, however, under the Court's decisions in *Mitsubishi, McMahon, Gilmer* and *Green Tree*, whether the public policy reflected in RICO conflicted with the restricted remedies afforded by the arbitration clause was the very thing the Eighth Circuit needed to consider to, in its words, "determine whether a valid agreement to arbitrate exists." At bottom, then, *Werries* is simply a recent, isolated case to be corrected or marginalized in the normal course of judicial affairs.

Ironically, the mistake Petitioners make in constructing their much different conflict matrix is the same mistake the Eighth Circuit made in *Werries* – going beyond the issue presented and relying on cases that do not involve the validity of arbitration clauses that thwart pursuit of federal statutory rights. *Metro East Center For Conditioning and Health v. Qwest Communications Int'l, Inc.*, 294 F. 3d 924 (7th Cir. 2002) (waiver of common law attorney's fee rights); *Arkcom Digital Corp. v. Xerox Corp.*, 289 F. 3d 536 (8th Cir. 2002) (state statutory rights); *MCI Telecommunications Corp. v. Matrix Communications Corp.*, 135 F. 3d 27 (1st Cir. 1998) (effect of tariff limitation on remedies); *Great Western Mortgage Corp. v. Peacock*, 110 F. 3d 222 (3d Cir. 1997) (waiver of state statutory rights). But if the question of whether Congress has evinced an intent to override the Federal Arbitration Act when the arbitration agreement conflicts with the rights

afforded by a later statute, and thus the question of the arbitration agreement's validity is removed from the equation, all that remains is an arbitration clause that is valid under the Federal Arbitration Act,[2] and the question whether a litigant's waiver of whatever rights are involved will be upheld or invalidated on other grounds. Cases consigning the latter question to arbitration do not speak to the issue of whether the former question, which this Court has held to be the province of courts, should suffer a like fate.[3]

While federal statutory rights were not at issue, the Court's decision in *Prima Paint Corp. v. Floor & Conklin Mfg. Co.*, 388 U.S. 395 (1967), relied upon in many of the above cases, also underscores the dichotomy at work here. The Court held in *Prima Paint* that a claim of fraudulent inducement directed to the arbitration clause itself challenged the validity of "the making of the arbitration agreement" within the meaning of 9 U.S.C. § 4 and thus was an issue for the court to decide; whereas a claim that the entire contract was fraudulently induced did not and was for the arbitrators to decide. *Id.* at 403-404. Similarly, in *Metro East, Arkcom Digital, MCI* and *Great Western*, the

[2] State law cannot render agreements to arbitrate unenforceable under the Federal Arbitration Act. *Southland Corp. v. Keating*, 465 U.S. 1, 10-17 (1984).

[3] Petitioners also miss this dynamic when scattering citations throughout their petition to cases holding, in various contexts not involving federal statutory rights, that parties can waive their rights in arbitration. *E.g., Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995) (common law right to punitive damages in a negligence case). Here, the issue is not whether the parties can waive their rights, but congressional intent.

issue of waiver of non-federal statutory rights did not go to the validity of the arbitration clause under the Federal Arbitration Act, and thus, under *Prima Paint*, could be decided by arbitrators. On the other hand, when the issue is whether the arbitration agreement is void because it precludes pursuit of federal statutory rights, the issue goes to the validity of the arbitration agreement itself and, under both *Prima Paint* and the Court's decisions in *Mitsubishi, McMahon, Gilmer* and *Green Tree*, is for the court to decide.

D. The Court's Decision in *Howsam v. Dean Witter Reynolds, Inc.* Will Not Impact The Judgment Below

In reason E for granting the petition, Petitioners suggest that the Court should grant the petition and hold it in abeyance because a reversal in *Howsam v. Dean Witter Reynolds, Inc.* "will almost certainly require the reversal of the judgment" below. However, the question in *Howsam* is entirely different, and its resolution will have no impact on the question Petitioners present or the judgment below.

The issue in *Howsam* emanates from the Court's decision in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), where the question was not, as it is here, whether courts or arbitrators should pass upon the validity or enforceability of an arbitration clause, but who should decide whether a particular claim is arbitrable under an otherwise valid arbitration clause. The Court held that, unless the parties clearly and unmistakably agreed to submit the issue of arbitrability itself to arbitration, courts should decide this issue as well. *Id.* at 943-944.

A standard provision in the NASD Code of Arbitration Procedure provides that "[n]o dispute, claim or controversy shall be eligible for submission to arbitration under this Code where six (6) years have elapsed from the occurrence or event giving rise to the act or dispute, claim or controversy." *Dean Witter Reynolds, Inc. v. Howsam*, 261 F. 3d 956, 959 (10th Cir. 2001). Over the years a conflict has developed among the Circuit Courts of Appeals as to whether this six (6) year limitation is simply a statute of limitations defense to be decided by arbitrators, or whether it goes to the question of arbitrability itself and thus, under *First Options,* may be decided by the court – an issue that has nothing to do with the instant case.

E. The Conflict Petitioners Perceive Concerning The Court Of Appeals' Subsidiary Holding Does Not Exist

Although not directed to the question presented, Petitioners argue in reason C for granting the petition that the Court of Appeals' subsidiary holding – that an arbitration agreement barring punitive damages precludes vindication of a RICO plaintiff's statutory right to treble damages – also gives rise to a conflict among the Circuits. Not so.

Petitioners first perceive conflict with the Second Circuit's decision in *Roby v. Corporation of Lloyd's*, 996 F. 2d 1353 (2d Cir. 1993), where the Court of Appeals held that the forum selection, choice of law and arbitration clauses in contracts between American "Names" and Lloyd's of London were enforceable even though the effect would be to deny American plaintiffs the full range of rights and remedies available under United States securities laws and RICO. The problem in *Roby* was not,

however, with the arbitration clause, which merely selected an arbitral over a judicial forum, but with the impact the forum selection and choice of law clauses had on the plaintiffs' remedies. And the point of decision was not, as it is in this case, resolution of the conflict between congressional policy as reflected in the Federal Arbitration Act and in the treble damage provisions of RICO, but a finding that the proper balance between federal statutory rights and the realities of international trade and commerce required a tilt towards the latter, *id.* at 1362-1366, a point this Court has made in several contexts. *E.g., Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 516 (1974) (A choice of forum/law clause is "an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction.").

The absence of any conflict between *Roby* and the Court of Appeals' decision below is amply demonstrated by the fact that the Eleventh Circuit, considering the very same clauses and issues presented in *Roby*, reached the same conclusion while noting that domestic arbitration clauses were different:

> *McMahon*, however, involved the enforceability of an arbitration clause in a *domestic* securities agreement. Although appellants contend that *McMahon* makes clear the Court's categorical unwillingness to permit waiver of the substantive remedies of the securities laws, we do not think that *McMahon* controls the case before us. As stated above, the Court consistently has treated 'truly international agreements,' *Scherk*, 417 U.S. at 515, 94 S. Ct. at 2455, different than domestic transactions. . . .

Lipcon v. Underwriters At Lloyd's, London, 148 F. 3d 1285, 1294 (11th Cir. 1998).

Finally, on an issue that goes neither to the question presented nor any other substantial federal question, Petitioners point out that the Fifth Circuit's recent conclusion in *Investment Partners* that the concept of punitive damages does not encompass treble damages conflicts with the decision below. Rather than represent a significant split on the question, however, the *Investment Partners* decision is simply an outlier. Virtually every federal court to consider the question, including this one, has expressed a view consistent with that expressed below. *See, e.g., Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 786 (2000) (treble damages "are essentially punitive in nature"); *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 639 (1981) ("The very idea of treble damages reveals an intent to punish"); *Commissioner v. Glenshaw Glass Co.*, 348 U.S. 426, 427 (1955) (holding that "money received as exemplary damages for fraud or as the punitive two-thirds portion of a treble-damage antitrust recovery must be reported by a taxpayer as gross income"); *Perez v. Z Frank Oldsmobile, Inc.*, 223 F. 3d 617, 624 (7th Cir. 2000) ("Treble damages are a *form* of punitive damages."); *United States v. SCS Business & Technical Institute, Inc.*, 173 F. 3d 870, 877 (D.C. Cir. 1999) (treble damages create a form of punitive damages inconsistent with state liability); *FDIC v. W. R. Grace & Co.*, 877 F. 2d 614, 623 (7th Cir. 1989) ("treble damages are a common form of punitive damages"); *F.C.I. Realty Trust v. Aetna Cas. & Sur. Co.*, 906 F. Supp. 30, 32 n.1 (D. Mass. 1995) ("Treble damages are a form of punitive damages. . . . "). Indeed, the law was sufficiently clear on the subject that the PacifiCare Petitioners did not even bother to raise the issue below.

CONCLUSION

For the above reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Dated September 12, 2002

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